United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,821

ERNEST J. FONTANA,

Appellant,

v.

AETNA CASUALTY AND
SURETY COMPANY,

Appellee.

Appeal from the United States District Court
for the District of Columbia

J. E. BINDEMAN
LEONARD W. BURKA

606 Landmark Building
Washington 5, D. C.

Attorneys for Appellant

QUESTIONS PRESENTED

1. Was appellee's claim barred by the Statute of Limitations where the uncontroverted evidence was that appellee had actual notice of appellant's alleged fraudulent claim more than three years prior to the filing of its complaint?

2. Where appellant claimed that appellee had notice of appellant's alleged fraudulent claim, at the very latest, on November 13, 1959, more than three years prior to the filing of its complaint, and appellee claimed that it first learned the facts of appellant's alleged fraudulent claim in December, 1962, was there a question of fact presented precluding the granting of summary judgment?

3. Did the District Court err in not finding that payments made by appellee to appellant were made with full knowledge of appellant's alleged fraudulent claim where the undisputed evidence before the Court was that appellee's agent informed appellee of such alleged fraudulent claim, and nonetheless appellee continued to make payments to appellant on account of said claim?

4. Did appellee waive its right to claim return of payments made to appellant where appellee continued to make payments to appellant after learning of appellant's alleged fraudulent claim, and then did nothing for a period of thirty-three months?

INDEX

TABLE OF CASES

STATUTES AND RULES

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* Authorities chiefly relied upon.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the District of Columbia entered on October 14, 1965, in favor of appellee Aetna Casualty and Surety Company against appellant Ernest J. Fontana.

This Court has jurisdiction pursuant to Section 1291, Title 28, United States Code.

STATEMENT OF THE CASE

On May 13, 1958, and prior thereto, appellant was employed by the Clark-Fontana Paint Company, hereinafter referred to as the "Company". On August 19, 1958, appellant gave notice to appellee, insurance carrier, that he had sustained a certain injury on May 13, 1958, while in the course of his employment (J.A. 1, 11).

Appellant filed formal claim with the Bureau of Employees' Compensation, hereinafter referred to as the "Bureau", in August, 1958.

Pursuant to such claim, appellee paid appellant $9,164.57 as compensation, and $3,330.75 as medical expenses between October 8, 1958 and July 31, 1961. These payments were made voluntarily by appellee, before formal hearing and without order of the Bureau (J.A. 5, 11).

After July 31, 1961, appellee refused to make any further payments to appellant or on his behalf. Appellant thereupon requested the Bureau to hold a formal hearing, and such hearing was held on December 13, 1962 and January 31, 1963 (J.A. 2, 11).

At such hearing, Charles A. Shortt, insurance broker and agent of appellee, testified, over appellant's objection, that Reginald Clark, President of the Company, had told him some six to ten months after the accident, namely, between November 13, 1958 and March 13, 1959, that appellant's claim was "faked". Shortt further testified that he reported this information directly to appellee about a year to a year and one-half after the accident, namely, between May 13, 1959 and November 13, 1959 (J.A. 12, 14).

At the conclusion of the hearing, the Deputy Commissioner disallowed appellant's claim and, citing Shortt's testimony, made a finding "that the claimant (appellant) did not sustain a personal injury on May 13, 1958, as alleged." The Deputy Commissioner thereupon rejected appellant's claim (J.A. 11).

Appellant sought judicial review of the Deputy Commissioner's finding in the lower court, same being Civil Action No. 1114-63, filed April 30, 1963. The court granted summary judgment in favor of the Deputy Commissioner. No appeal was taken therefrom.

On May 25, 1964, appellee filed suit herein, demanding $14,465.32 as repayment from appellant of all monies paid on account of appellant's compensation claim, including attorney's fees and costs in the amount of $1,970.00 (J.A. 1). Cross-motions for summary judgment were filed (J.A. 4, 10). In his motion, appellant asserted (1) that appellee's claim was barred by the Statute of Limitation; (2) that the payments were made by appellee with full knowledge of the surrounding facts and circumstances, including the alleged fraud, and thus could not be recovered; (3) that appellee had waived its right to claim return of payments; and (4) in any event, appellee was not entitled to reimbursement from appellant for attorney's fees and costs. The District Court granted summary judgment for the appellee and denied appellant's motion. On October 14, 1965, judgment was granted in favor of the appellee in the amount of $14,465.32, interest and costs (J.A. 13). Notice of Appeal was filed on October 28, 1965 (J.A. 20).

STATUTE INVOLVED

Title 12-301, D.C. Code, 1961, as amended:

> "Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:
>
> * * * * *
>
> (8) for which a limitation is not otherwise specially prescribed – 3 years.
>
> * * * * *"

STATEMENT OF POINTS

1. The Court erred in failing to find that appellee's claim is barred by the Statute of Limitations.

2. The Court erred in granting appellee's Motion for Summary Judgment as a question of fact existed as to when appellee received notice of appellant's alleged fraud.

3. The Court erred in failing to find that payments made by appellee to appellant were made with full knowledge of the surrounding facts and circumstances, including the alleged fraud, and thus cannot be recovered.

4. The Court erred in failing to find that appellee has waived its rights to claim return of payments.

SUMMARY OF ARGUMENT

1. Appellee's claim was barred by the Statute of Limitations. The uncontradicted evidence before the District Court was that appellee's agent informed appellee more than three years prior to the filing of its complaint that appellant's claim for compensation was fraudulent. Nonetheless, appellee thereafter continued to make voluntary payments to appellant. Approximately four and one-half years after having actual knowledge of the alleged fraudulent claim, appellee brought suit demanding return of the payments. Such suit was not timely filed.

2. A question of fact was presented when appellee, in its Motion for Summary Judgment, claimed that it first had full knowledge of appellant's alleged fraudulent claim at the formal hearing before the Bureau. Appellant claimed that appellee had actual knowledge of the alleged fraudulent claim when appellee's agent so informed appellee in December, 1959. This issue of fact was material as it determined the date when the Statute of Limitations commenced to run as to appellee's claim for repayment. In view of the foregoing, appellant submits that it was error for the District Court to grant appellee's Motion for Summary Judgment.

3. Appellee had constructive notice of appellant's alleged fraudulent claim between November 13, 1958 and March 13, 1959, when appellee's agent received such notice. Appellee's agent informed appellee between May 13, 1959 and November 13, 1959 of such alleged fraudulent claim. Nonetheless, appellee continued to make voluntary payments to appellant before formal hearing and without order of the Bureau until July 31, 1961. Appellant submits that monies so voluntarily made with knowledge of the alleged fraudulent claim cannot be recovered.

4. Appellee had waived its rights to claim return of payments made to appellant. Subsequent to the finding and Order of the Deputy Commissioner of the Bureau, wherein the Deputy Commissioner found that

appellant had not sustained an injury as he had alleged, appellant sought judicial review of such finding and Order in the Court below. In such proceeding, appellee intervened, urging affirmation of the Deputy Commissioner's finding. Once having intervened, it was incumbent upon appellee to plead, in the nature of a compulsory counterclaim, its claim for repayment of monies paid to appellant. This appellee did not do. Accordingly, appellant contends that appellee had waived its rights to claim such repayment in a subsequent proceeding.

Appellant further submits that appellee's inactivity for nearly thirty-three months after first learning of appellant's alleged fraudulent claim constitutes a waiver of any claim for repayment as a matter of law.

ARGUMENT

I.

THE COURT ERRED IN FAILING TO FIND THAT APPELLEE'S CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS

Appellee's claim was barred by the Statute of Limitations, Section 12-301, D.C. Code, 1961, as amended.

The uncontroverted facts are that appellant filed claim for compensation with the Bureau on August 19, 1958, as a result of injuries which he claimed he sustained in the course of his employment on May 13, 1958 (J.A. 1). Pursuant to such claim, appellee voluntarily paid to appellant $9,164.57 as compensation, and $3,330.75 as medical expenses during the period October 8, 1958 to July 31, 1961 (J.A. 5, 11). Thereafter, when claim was made for additional benefits, appellee refused to pay additional monies and the matter was set for formal hearing before a Deputy Commissioner of the Bureau. At such hearing, held on December 13, 1962 and

January 31, 1963, appellee's agent testified that he had acquired knowledge of appellant's alleged "faked" claim sometime between November 13, 1958 and March 13, 1959, and had personally given this information to appellee sometime between May 13, 1959 and November 13, 1959 (J.A. 12, 14). Accordingly, appellee had actual knowledge of appellant's alleged "faked" claim, at the very latest, on November 13, 1959, four and one-half years before May 25, 1964, when appellee filed its complaint herein (J.A. 12, 14).

Appellee itself has admitted that it had knowledge of the alleged fraud no later than November 13, 1959 (J.A. 14). Accordingly, the Statute began to run from such date and this suit is thereby barred.

Wiren v. Paramount Pictures, Inc., 92 U.S. App. D.C. 347, 206 F.2d 465, Cert. den. 74 S. Ct. 378, 346 U.S. 939, 98 L. Ed. 426 is directly on point.

In such case, plaintiff sued for damages based upon fraud. This Court affirmed the lower Court's dismissal of the complaint on the ground that it was barred by the Statute of Limitations, saying (92 U.S. App. D.C. 348):

> "We agree that the statute of limitations had run and on that ground affirm the order dismissing the complaint. In an action for fraud the three year limitations contained in §12-201, D. C. Code (1951), applies. District-Florida Corp. v. Penny, 1933, 62 App. D.C. 268, 66 F.2d 794. *While the period begins only upon discovery of facts out of which the claim of fraud arises, or from the time such facts should reasonably have been ascertained in the exercise of due diligence. . . .* the pleadings do not contain allegations within this rule so as to enlarge the three year period." (Emphasis supplied)

It is clear that appellee had at least *constructive* knowledge of this alleged fraud when its agent allegedly learned about it some six to ten months after the alleged accident happened, or between November 13, 1958 and March 13, 1959; and that appellee had *actual* knowledge of such alleged fraud a year to a year and one-half after the accident, namely, between May 13, 1959 and November 13, 1959.

In the District Court appellee admitted receiving actual notice of the alleged fraud as aforesaid (J.A. 14), but contended that the Statute of Limitations did not commence to run until the date of the formal hearing before the Bureau (J.A. 14). Such contention is not in accordance with law.

In *P. H. Sheehy Company. v. Eastern Importing & Mfg. Company,* 44 App. D.C. 107, 16 F. 810 (1915), this Court stated that in cases of fraud "it cannot be said that a person should assert a right before he has knowledge of, **or is chargeable** with knowledge of, the same." This Court continued:

> "He must be diligent in informing himself upon the true state of affairs, culpable ignorance being offensive both in equity and at law."

In *White v. Piano Mart,* 110 A.2 542 (D.C. Mun. App. 1955), an action by a purchaser of a used piano for breach of warranty by the seller, that Court held (110 A.2 543):

> "That in an action based on fraud the Statute of Limitations begins to run not when the cause of action accrued, but from the discovery of the facts out of which the claim arose, *or from the time when the facts should have reasonably been found out in the exercise of due diligence."* (Emphasis supplied)

Appellee was put on notice, at the latest, on November 13, 1959, when it had been advised by Shortt of appellant's alleged fraud. At such

time, reasonable care and diligence dictated an immediate, full and complete investigation. Such an investigation conducted at that time would have disclosed every item of information which the appellee claims to have learned for the first time at the Bureau's hearing on December 13, 1962 and January 31, 1963.

In *Maloney v. E. I. DuPont de Nemours & Co., Inc.*, ____U.S. App. D.C.____, 352 F.2d936, (Appeal No. 18,454, decided June 10, 1965), this Court considered a similar question regarding fraud and the Statute of Limitations. In that case, appellant entered into an employment contract with appellee. Under such contract appellant was purportedly employed for such time as both appellant and appellee should decide to terminate the arrangement. Thereafter, appellant was discharged and he brought suit alleging that he was fraudulently induced to leave former employment and accept employment with appellee by the promise that his employment would be permanent. This Court held:

> "The action for fraud . . . was brought January 13, 1964. This was exactly three years after appellant had received formal notice that DuPont no longer wished his services. However, it is uncontroverted that appellant was given oral notice of DuPont's belief that it had the right to fire him under the contract, and intended to exercise that right, in November and December 1960. Since a three-year statute of limitations applies, and appellant must have discovered the putative fraud in 1960 at the very latest, it appears that the suit was barred. Wiren v. Paramount Pictures, Inc., 92 U.S. App. D.C. 347, 206 F.2d 465 (1953), cert. denied, 346 U.S. 938 (1954)."

The Court thereupon affirmed the judgment of the Court below, dismissing the claim as being barred by the said Statute.

Appellee discovered the facts out of which the claim of fraud arose approximately four and one-half years prior to the filing of its complaint herein. Appellee's knowledge of the facts was acquired at the time its

agent informed it of the alleged "faked" claim (not later than November 13, 1959). Since this action was filed more than three years after the knowledge of the facts was acquired, it is barred by the Statute of Limitations aforesaid.

II.

THE COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AS A QUESTION OF FACT EXISTED AS TO WHEN APPELLEE RECEIVED NOTICE OF APPELLANT'S ALLEGED FRAUD.

Appellant contends that the foregoing is dispositive of the issues herein regarding the District Court's denial of his Motion for Summary Judgment. However, in any event, appellant claims that the District Court erred in granting appellee's Motion for Summary Judgment, since at the very minimum a question of fact was presented.

Appellant asserted that the Statute began to run from the date appellee's agent informed appellee of the alleged fraud. Appellee contended to the lower Court that the Statute did not commence to run until the time of the formal hearing at the Bureau, when it allegedly learned for the first time of sufficient information upon which to found an action on fraud (J.A. 14). The question of fact related to the facts and circumstances as to when appellee first had knowledge of the alleged fraud. This could not be determined by the Court in favor of appellee without a trial.

This Court, in *Wyatt v. Madden,* 59 App. D.C. 38, 39, 32 F.2d 838 (1929) held:

> "The enforcement of Rule 73 deprives a defendant of a trial on the merits. Therefore, we have ruled that plaintiff's affidavit must be strictly construed. [Citations omitted] An affidavit of defense, on the contrary, is to be liberally construed, and, if its terms reasonably warrant the inference that the defendant has a substantial defense to plaintiff's claim, summary judgment ought not to be entered [Citations omitted]"

Further, allegations of fraud, as a general rule, normally raise genuine issues of material fact, *Saslaw v. Rosenfeld*, 148 A.2d 311, 312 (D.C. Mun. App. 1959); *Wyatt v. Madden*, , *supra; Trans World Airlines, Inc. v. Skyline Air Parts, Inc.*, 193 A.2d 72, 73 (D.C. App. 1963).

For the purpose of considering appellee's motion, it would seem that a material issue of fact existed. Appellee contended that it first learned of the alleged fraudulent claim on December 13, 1962, at the time of the formal hearing at the Bureau. Appellant contended that appellee knew of the alleged fraud on November 13, 1959, at the very latest. Such issues could not be resolved on summary judgment.

In view of the foregoing, the District Court erred in granting appellee's Motion for Summary Judgment.

III.

THE COURT ERRED IN FAILING TO FIND THAT PAYMENTS MADE BY APPELLEE TO APPELLANT WERE MADE WITH FULL KNOWLEDGE OF THE SURROUNDING FACTS AND CIRCUMSTANCES, INCLUDING THE ALLEGED FRAUD, AND THUS CANNOT BE RECOVERED.

According to testimony of appellee's agent Shortt, he informed appellee sometime between May 13, 1959 and November 13, 1959, that appellant's associate had advised him that appellant's claim was "faked" (J.A. 12). At such time, appellee could have refused to make any further payments to appellant and required him to undergo a formal hearing at the Bureau.

Appellee did not refuse to make such payments and did not even report the alleged fraud to the Bureau. Appellee continued to pay appellant all of the monies which it now seeks to recover. On July 31, 1961, appellee finally refused to make further payments to appellant. Appellant thereupon requested a formal hearing by the Bureau, as a consequence of which appellee was not required to make any further payments.

Inasmuch as appellee was fully advised of all of the facts surrounding any fraud alleged to have been perpetrated by appellant and, notwithstanding same, continued to make the said compensation payments, the said payments were voluntarily made with full knowledge of such circumstances. Certainly no additional testimony or evidence was later adduced in any proceeding which gave appellee further or additional information regarding the alleged fraud than it previously had while continuing to make said voluntary payments to appellant.

Appellee concedes that in order for it to recover monies paid to appellant upon a fraudulent claim, it must allege and prove that the said monies were paid *in reliance of the alleged fraudulent representations of appellant*. *McNabb v. Thomas*, 88 U.S. App. D.C. 379, 380, 190 F.2d 608, Cert. den. 72 S. Ct. 86, 342 U.S. 859, 96 L. Ed. 646.

The record herein clearly demonstrates that appellee's agent, Shortt, was advised of the alleged fraud within six to ten months after the accident (J.A. 12). Since Shortt was appellee's agent, appellee must be considered to have constructive notice of the alleged fraud when Shortt received information that appellant's claim was "faked", namely, six to ten months after the accident, or between November 13, 1958 and March 13, 1959. Knowledge of an agent is imputed to his principal, *Bowen v. Mount Vernon Sav. Bank*, 70 App. D.C. 273, 105 F.2d 796 (1939). It is undisputed that Shortt clearly was appellee's agent.

Shortt testified before the Bureau that he told appellee of this alleged fraud a year to a year and a half after the accident, or between May 13, 1959 and November 13, 1959 (J.A. 12). Thus, appellee had actual knowledge of the alleged fraud on or before November 13, 1959. Notwithstanding this notice, however, and while in full possession of information regarding appellant's alleged fraudulent claim, appellee nonetheless continued to make voluntary payments to appellant until July 31, 1961 (J.A. 11).

Appellee cannot claim that it paid appellant the monies it now seeks to recover in reliance upon the alleged fraudulent claim since appellee admittedly possessed knowledge of the alleged fraud at the time the said payments were made. According to the testimony of its own agent, appellee paid the said monies with full knowledge of the surrounding facts and circumstances of the claim.

Monies voluntarily paid with full knowledge of the surrounding facts and circumstances cannot be recovered. *Thompson v. Deal*, 67 App. D.C. 327, 92 F.2d 478 (1937); *MacNamee v. Hermann*, 60 App. D.C. 295, 53 F.2d 549 (1931); *Voulgaris v. Press*, 116 A.2d 691 (D.C. Mun. App. 1955).

In *Thompson v. Deal, supra*, this Court said (67 App. D.C. 333):

> "We are not unmindful of the rule that ordinarily when money has been voluntarily paid with full knowledge of the facts it cannot be recovered on the ground the payment was made under a misapprehension of the legal rights and obligations of the person paying."

This Court, in *MacNamee v. Hermann, supra*, reiterated the rule that monies voluntarily paid, even under a misapprehension of the payor's legal rights, are not recoverable so long as the parties stand on an equal footing as to means of knowledge of their obligations.

In *Voulgaris v. Press, supra*, the Court said (116 A.2d 692):

> ". . . It has always been the law that monies voluntarily paid with full knowledge of the surrounding facts and circumstances, though paid under a mistaken view of the law, cannot be recovered [Citations omitted]."

In view of the foregoing, it is respectfully submitted that the lower Court erred in failing to find that appellee paid the said monies to appellant with full knowledge of the facts and circumstances surrounding the claim for compensation, and in the absence of duress or coercion, and thus cannot now seek to recover the same.

IV.

THE COURT ERRED IN FAILING TO FIND THAT APPELLEE HAS WAIVED ITS RIGHTS TO CLAIM RETURN OF PAYMENTS.

A.

On April 30, 1963, appellant sought judicial review in the lower Court of the findings by the Deputy Commissioner of the Bureau to set aside the said Deputy Commissioner's Order of April 1, 1963, wherein he had rejected appellant's claim (J.A. 6).

On or about May 15, 1963, appellee filed motion in such suit to intervene as party defendant, alleging its continuing interest in the controversy. Said motion was granted.

Once having intervened, it was incumbent upon appellee to plead, in the nature of a compulsory counterclaim against appellant, its claim which, at the time of serving the pleading, it had against him, since such claim arose out of the transaction or occurrence that was the subject matter of his claim. Rule 13(a), Federal Rules of Civil Procedure. Appellee did not file such counterclaim.

At the time of the intervention, appellee possessed the identical knowledge and claim for return of monies paid to appellant as it had when it filed its complaint in this suit, based upon the alleged fraud of appellant. Such claim arose out of the same transaction or occurrence that was the subject matter of appellant's claim, and did not require for its adjudication the presence of third parties not before the Court. There was no other pending action in which appellee's claim was being litigated. Inasmuch as appellee did not raise the said claim in the said prior proceeding, it is submitted that it has waived and, therefore, lost any right to bring such claim in any subsequent proceeding. *Ake v. Chancey*(CA 5th) 149 F.2d 310; *Pennsylvania R. Co. v. Musante-Phillips, Inc.*(D.C. Cal.) 42 F. Supp. 340.

In *Ake v. Chancey, supra,* a client sued his prior attorney for return of money. The arrangement between the parties provided that the attorney would undertake certain collections and the client would set the fee to be charged. The attorney collected and kept, of the client's money, $23,777.00, which he claimed as part payment of his fee. The client set the fee at 6 2/3% of the amount collected and sued for the balance. The lower Court dismissed plaintiff's claim and the appellate Court affirmed. On petition for rehearing, appellant cited the fact that the lower Court should have required an accounting. In denying such petition, the Court held that since the defendant had failed in the original suit to demand, by counterclaim, any additional sums which he claimed in excess of that for which he was sued, that would, under Rule 13(a),Federal Rules of Civil Procedure, preclude him from any further actions or demands for the recovery of any additional sum for services arising out of the transactions involved in the suit.

Pennsylvania R. Co. v.Musante-Phillips, Inc., supra, involved a suit to recover freight and other charges upon a carload of vegetables. Defendant was an intermediate or terminal carrier, alleged to have caused damage to the shipment. Defendant counterclaimed, alleging the damage to have been caused by plaintiff. Plaintiff moved to dismiss the counterclaim on jurisdictional grounds. The Court, citing Rule 13(a), Federal Rules of Civil Procedure, held, at p. 341:

> "This rule is mandatory, and if defendant does not plead any counterclaim which he has, he will be precluded by the judgment from raising the same matter in an independent action, statutory or otherwise.
>
> * * * * *

> * * * This result accords with the policy announced in Chicago & N.W. Ry. v. Lindell, 281 U.S. 14, 17, 50 S. Ct. 200, 74 L. Ed. 670, where it is said: 'The adjustment of defendant's demand by counterclaim in plaintiff's action rather than by independent suit is favored and encouraged by the law. That practice serves to avoid circuity of action, inconvenience, expense, consumption of the courts' time, and injustice."

Accordingly, appellee's suit was barred by the judgment in said Civil Action No. 1114-63, and the lower Court erred in not so finding.

B.

Appellee also waived its right to disaffirm appellant's claim and for return of the payments paid him on account of its inactivity for nearly thirty-three months after first learning of appellant's alleged "faked" claim.

The Record shows that after appellee was put on notice of the alleged irregularity of defendant's claim, it continued to voluntarily pay appellant, on account of said claim, not ceasing such payments until July 31, 1961 (J.A. 11), thirty-three months after Shortt first learned of the alleged fraud. During this time, appellee took no steps to halt the payments and investigate the information it had received, but, rather, continued to accept premium payments for the policy and allowed matters to continue as though normal. Such facts constituted waiver by appellee as a matter of law. *Prudential Ins. Co. v. Saxe*, 77 U.S. App. D.C. 144, 134 F.2d 16 (1943), Cert. den. 63 S. Ct. 1033, 319 U.S. 745, 87 L. Ed. 1701.

Prudential, supra, involved a situation wherein the insurance company sought to cancel and disavow a claim on a life insurance policy for misstatements made by the policyholder in his policy application. The insured had failed to disclose a prior hospitalization in such application, although the evidence showed that the insurance company's agent was

apprised of such hospitalization by the insured's wife after the policy was in force. The agent did not convey this information to the company and continued to accept premium payments from the insured. The Court held, at p. 158:

> ". . . (the agent) might have received the premiums subject to the home office's approval after investigation or in any event (sic). Instead, both he and the company stood idle for nearly a month and until the loss fell. Then, in order to avoid it, the insurer did what it should and could have done beforehand."
>
> "These facts constituted a waiver as a matter of law."

This case before the lower Court makes out a stronger argument for waiver – there having been inactivity for not one month, but for thirty-three months! It is respectfully submitted that the lower Court erred in failing to find such waiver.

CONCLUSION

The judgment of the District Court should be reversed and summary judgment entered in favor of appellant.

Respectfully submitted,

J. E. BINDEMAN

LEONARD W. BURKA

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Washington 5, D. C.

Attorneys for Appellant

INDEX

JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AETNA CASUALTY & SURETY CO.
a corporation
1700 K Street, N.W.
Washington, D.C.
Plaintiff

v.

ERNEST J. FONTANA
7030 Oregon Avenue, N.W.
Washington, D.C.
Defendant

Civil Action No.
1243-64

[Filed May 25, 1964]

COMPLAINT
(Money Due)

1. Jurisdiction of this Court is founded on the Code of Laws in and for the District of Columbia, and the amount in controversy exceeds the amount of Ten Thousand Dollars, exclusive of costs.

2. On to wit, May 13, 1958, the defendant, Ernest J. Fontana, was employed by the Clark-Fontana Paint Company when he allegedly sustained an injury in the course of his employment for said company; that on the day and date aforesaid, the plaintiff, Aetna Casualty & Surety Co., maintained in full force and effect for the Clark-Fontana Paint Company a standard workmen's compensation policy affording medical payments and disability benefits for employees of the Clark-Fontana Paint Company who sustained injuries arising out of and in the course of employment; that as a result of the said alleged injury, claim filed by the defendant, and upon representations made by the defendant, the plaintiff herein made payments of compensation to the defendant in accordance with the

workmen's compensation law in effect in and for the District of Columbia amounting to $9,164.57 and paid medical expenses amounting to $3,330.75, and paid other expenditures for legal expense and other miscellaneous expense totalling $1,970; that on December 13, 1962, and January 31, 1963, a formal hearing was held before the Deputy Commissioner of the Bureau of Employees' Compensation at which the plaintiff herein raised defenses to the defendant's claim, alleging that the claim of the defendant herein was based upon fraud and misrepresentation; that after a full hearing of all the evidence, the said Deputy Commissioner rejected the defendant's claim for compensation on the grounds that the plaintiff did not sustain a personal injury as alleged on May 13, 1958; that the order of the said Deputy Commissioner is attached hereto and made a part hereof by reference and is further identified as Exhibit A; that the defendant thereafter appealed this decision to the United States District Court for the District of Columbia, being civil action No. 1114-63, and on cross motions for summary judgment, the Court granted the present plaintiff's motion sustaining the Deputy Commissioner; that the order of said Court in that matter is attached to this complaint and made a part hereof by reference, being further identified as Exhibit B.

2. Since the order of the United States District Court above referred to, the plaintiff, Aetna Casualty & Surety Co., has made many requests of the defendant for reimbursement of all compensation, medical bills and other expenses paid by the plaintiff on behalf of the defendant and in defense of the defendant's fraudulent claim, but defendant has refused to make restitution.

WHEREFORE, the premises considered, plaintiff demands judgment of the defendant in the amount of Fourteen Thousand Four Hundred Sixty-five and 32/100 Dollars ($14,465.32) plus interest and costs of this suit.

/s/ M. S. MAZZUCHI
Attorney for Plaintiff
405 Investment Building
Washington, D.C.

[Filed November 25, 1964]

ANSWER

First Defense

The complaint fails to state a cause of action upon which relief may be granted.

Second Defense

Any payments made by plaintiff Aetna Casualty & Surety Co. were made voluntarily by plaintiff and after extensive investigation by the plaintiff. Plaintiff is therefore barred from any recovery herein.

Third Defense

Plaintiff has waived all of its rights, if any, to collect any payments hereunder.

Fourth Defense

1. Defendant states that he is not required to answer the allegations contained in paragraph 1.

2. Defendant admits that on May 13, 1958, he sustained an injury in the course of his employment for Clark-Fontana Paint Company, and that on that date plaintiff maintained in full force and effect for the Clark-Fontana Paint Company, a standard workmen's compensation policy. Defendant further admits that he filed claim on such injury. Defendant admits that thereafter the plaintiff made various payments of compensation voluntarily to the defendant, but denies that they were made only upon defendant's representations, and states that same were made after exhaustive investigations by the said plaintiff. Defendant admits that the Deputy Commissioner rejected defendant's claim for additional compensation and that an appeal to the District Court for the District of Columbia resulted in dismissal of such appeal.

3. Defendant denies that plaintiff is entitled to restitution of any of the sum paid.

4. All allegations not specifically admitted are denied.

WHEREFORE, defendant prays that the action be dismissed.

BINDEMAN AND BURKA

By /s/ J. E. Bindeman
Attorneys for Defendant
606 Landmark Building
1343 H Street, N.W.
Washington 5, D.C.

[Certificate of Service]

[Filed April 13, 1965]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, Aetna Casualty & Surety Co. and moves this Honorable Court to enter judgment for the plaintiff on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law.

In support thereof, plaintiff refers this Honorable Court to the attached memorandum of points and authorities.

M. S. MAZZUCHI

by /s/ John F. Gionfriddo
Attorneys for Plaintiff

[Certificate of Service]

[Filed April 13, 1965]

POINTS AND AUTHORITIES

This case arises out of a workmen's compensation claim originally filed by the defendant herein against the plaintiff, the workmen's compensation carrier for defendant's employer. Defendant's employer

was a closely held corporation owned by the defendant and one other individual in which the defendant served as Secretary-Treasurer.

In substantiation of his said claim, the defendant represented to plaintiff and to the Bureau of Employee's compensation, United States Department of Labor that he had suffered an industrial accident while in the course of his employment on May 13, 1958; that the said accident resulted in an injury to his shoulder and back and precipitating certain further disabilities. The employer's report of accident submitted by the claimant and defendant, documented claimant and defendant's allegation of injury. We invite the Court's attention to the fact that claimant-defendant was one of two owners of the corporate stock.

Pursuant to the established procedures, informal conferences were held before claims examiners of the Bureau of Employee's Compensation, United States Department of Labor at which the defendant appeared and made representations in support of his claim.

As a result of defendant's claim and representations in support thereof, the plaintiff paid to defendant, workmen's compensation in the amount of Nine Thousand One Hundred Sixty-four and 57/100 ($9,164.57) Dollars, medical expenses on behalf of defendant in the amount of Three Thousand Three Hundred Thirty and 75/100 ($3,330.75) Dollars and incurred additional expenses directly relating thereto in the amount of One Thousand Nine Hundred Seventy ($1,970.00) Dollars.

Following such payment defendant attempted to reopen his claim asserting the need for additional medical treatment as a result of the originally claimed accident of May 13, 1958. Plaintiff controverted defendant's claim pursuant to procedures established by the Workmen's Compensation Law, said controversion culminating in a formal hearing before the Deputy Commissioner.

The Deputy Commissioner entered an order in favor of the plaintiff herein which order has been previously filed in this action and made a part hereof:

In pertinent part the Deputy Commissioner made findings of fact as follows:

a) The testimony of the claimant-defendant herein was inconsistent and was deemed incredible.

b) That the claimant-defendant herein did not sustain a personal injury on May 13, 1958 as alleged.

The Deputy Commissioner, therefore, made the determination as a matter of fact that the defendant's representation that he was injured on May 13, 1958 in the course of employment was a false representation since no such injury had occurred. Defendant was, therefore, not entitled to compensation or medical payments on his behalf by the plaintiff since such payments were both induced and accepted as the result of misrepresentation by the defendant.

Defendant thereupon brought in this Court, Civil Action Number 1114-63, Fontana vs. Einbinder in which suit the plaintiff herein intervened as a party defendant.

Defendant's complaint in that action attacked specifically the finding of fact by the Deputy Commissioner that defendant had not sustained an injury on May 13, 1958.

Following cross motions for summary judgment, a memorandum opinion was issued by the Court on December 6, 1963, which read in pertinent part,

> " . . . . . the Court is of the opinion that the record as a whole supports the Deputy Commissioner's findings that plaintiff did not sustain an injury on May 13, 1958 as alleged."

The motions of defendants, the Deputy Commissioner and Aetna Casualty and Surety Company, plaintiff herein, were granted and the motion of Ernest J. Fontana, defendant herein, was denied.

Plaintiff then brought this action for the return of the funds paid to and on behalf of the defendant as the result of defendant's fraud and misrepresentation in presenting his claim, including the payment thereof and accepting and retaining the said funds to which he had no legal right. Plaintiff also seeks to recover the expenses incurred as a direct result of fraud perpetuated by the defendant.

No question of fact exists in this action. Defendant fully admits presentation of the claim before the Workmen's Compensation Commission, payment and acceptance of the monies, the ruling of the Deputy Commissioner and the ruling of the Court in the subsequent law suit, Fontana v. Einbinder.

It isuncontested that the monies were paid to and on behalf of the defendant as a result of his representations that he had suffered an industrial accident on May 13, 1958 and in the course of his employment and that the injuries he suffered were a result of that accident. The indisputable findings of fact that no such injury ever occurred conclusively establishes that such representations were false. It was upon those false representations that the plaintiff relied in paying the monies sued for. Defendant's actions, therefore, clearly constituted fraud. See U.S. v. Kiefer 97 U.S. App. D. C. 101, 228 F2d. 448, Tyssowski v. F. H. Smith Co. 35 App. D.C. 403, Rosenberg v. Howle 56 A2d. 709.

As this Court has indicated on many occasions, the essential elements of fraud are: 1) false representations; 2) in reference to material fact; 3) made with knowledge of its falsity; 4) with intent to deceive and, 5) action taken in reliance upon the representation.

The fact that payment of the monies involved was secured by defendant's fraud cannot be relitigated in this action as the finding of the

Court on that point in Fontana v. Einbinder is res judicata, the question having been specifically litigated and determined there and both parties herein having been parties to that action. See Baldwin v. Iowa State Traveling Men's Association 283 U.S. 522 51 S. Ct. 517, Spilker v. Hawkin 88 U.S. App. D.C. 206, Usher v. 1015 N St., N.W. Co-op Ass'n. 120 A2d 921, Wolf v. Paving Supply and Equip Co. 154 A2d 544, Randolph v. District of Columbia 156 A2d 686, Fletcher v. Vakas 144 A2d 105.

The sole remaining question then is whether, considering all of the facts in this matter, the plaintiff is entitled as a matter of law to the return of its expenditures.

The plaintiff's position as outlined above is two-fold. First, that the defendant's fraud is established beyond dispute. The defendant made representations to plaintiff and the District of Columbia Workmen's Compensation Commission that he had been involved in an industrial accident which, in fact, never occurred. It is beyond question that the representations were made with full knowledge of their falsity since the alleged injury was supposedly suffered by the defendant himself, the maker of the representations, a point concerning which he could not be mistaken. The representations were made for the sole purpose of obtaining payments from the plaintiff insurance company and thus with intent to deceive. Plaintiff relied upon those representations in making the payments which defendant admits having received. Secondly, plaintiff submits that the fact of the fraud is res judicata. In Clark v. Fontana, the defendant himself raised the question of his fraud in specifically challenging the Deputy Commissioner's ruling that no industrial accident had occurred. That question was then litigated there and the Court again determined that no accident had occurred. Both parties herein having been fully heard there on the same factual question which was the basis for the defendant's fraud, the question cannot be again raised in this cause.

It follows, therefore, that plaintiff is entitled to the return of the monies paid to defendant in that when money is obtained by the false representation and fraud of the person receiving it, the person paying may recover even though the fraud was not the sole inducing cause of the payment. See 40 Am. Jur. 842. Even at common law a party who paid the money as the result of a fraud was entitled to waive the tort and bring an action in assumprit for return of the funds. It is generally accepted that one who has been fraudulently induced to part with money may sue in assumprit on an implied contract. The law implies a promise to return the money so received. See 24 Am. Jur. 25, 26 and cases cited therein.

Generally under modern concepts, it is well established that an action for money had and received will lie to recover money paid by mistake, under duress, oppression, or where an undue advantage was taken of plaintiff's situation whereby money was extracted to which the defendant had no legal right.

It has even been held that an employer may recover from an employee, wages paid pursuant to an employment contract where the employer discovers that the payment was induced by fraud. And where the amount paid cannot be apportioned between periods of good service and those tainted with fraud, the employer is entitled to all the compensation. See 88 ALR 2d 1430.

On the basis of an implied promise to return the funds and implied contract the plaintiff is entitled as a matter of law to the return of the compensation paid directly to defendant and the medical payments made on his behalf.

The remaining One Thousand Nine Hundred Seventy ($1,970.00) Dollars of plaintiff's claim which represents expenditures of the plaintiff not paid directly to defendant but expended as necessary and incidental expense to the defense of the defendant's claim, the plaintiff is

likewise entitled to have returned. These monies represent damages incurred as a direct result of defendant's fraud upon the plaintiff and must be returned to the plaintiff if the parties are to be placed in the Status Quo.

It has been held that when a defrauded party rescinds the contract he is entitled to recover damages "incidental to the contract and caused directly by the fraud." The special damages recoverable are awarded to compensate the defrauded party, for those expenditures made in reliance upon the misrepresentations. See Hushon v. Whelan 113 A 2d 484, 98 U.S. App. D.C. 82, Kent Houses Incorporated v. Frankel, 128 A 2d 444.

Plaintiff submits that the fact of defendant's fraud being Res Judicata all monies paid to and on behalf of defendant as well as expenditures made by plaintiff as a direct result of defendant's fraud are now due and owing plaintiff by defendant as a matter of law and plaintiff is entitled to judgment in full.

M. S. MAZZUCHI

By: /s/ John F. Gionfriddo
Attorneys for Plaintiff

[Filed May 18, 1965]

DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

Comes now the defendant, ERNEST J. FONTANA, and moves this Honorable Court for summary judgment on the ground that there is no genuine issue as to any material fact, and that defendant is thereby entitled to judgment as a matter of law.

BINDEMAN AND BURKA

By /s/ Leonard W. Burka
Attorneys for Defendant
606 Landmark Building
Washington 5, D.C.

[Certificate of Service]

[Filed May 18, 1965]

STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE ISSUE

1. In August, 1958, defendant filed claim with the United States Compensation Commission, Bureau of Compensation, for compensation as a result of injuries which he claimed he sustained on May 13, 1958, while in the course of his employment. Written notice of such claim was given to plaintiff by sending copy of same to Charles A. Shortt, insurance broker and plaintiff's agent, on August 19, 1958. The said agent forwarded such written notice to plaintiff on August 21, 1958.

2. Pursuant to such notice or claim, plaintiff voluntarily paid to defendant the sum of $740.57 on October 8, 1958, for temporary partial disability for the period May 14, 1958 through August 17, 1968.

3. In addition to the foregoing payment, plaintiff further voluntarily paid to defendant, for permanent partial disability, the sum of $54.00 per week for 156 weeks. Said payments commenced on August 18, 1958, and terminated on July 31, 1961. Said payments were made bi-weekly in the amount of $108.00, and totaled $8,424.00. Plaintiff thereafter discontinued further payments to defendant.

4. On May 1, 1962, defendant filed claim for additional benefits under the District of Columbia Workmen's Compensation Act for further injuries arising out of the original claim of May 13, 1958, which claim was denied by plaintiff and was set for formal hearing before the Deputy Commissioner. Said formal hearing was held on December 13, 1962, and January 31, 1963.

5. On April 1, 1963, the said Deputy Commissioner rejected defendant's said claim on the sole ground that defendant had not sustained a personal injury on May 13, 1958, as alleged. As part of said rejection, the Deputy Commissioner made certain finding of fact, as follows:

"13. That the testimony of the employer corporation's insurance broker [Shortt] impeached the testimony of the claimant and the president of the employer corporation as to the fact of the alleged injury of May 13, 1958;"

6. Said finding of fact aforesaid was based upon testimony given at said formal hearing by Charles A. Shortt. Shortt testified that he was informed six to ten months after May 13, 1958, or between November 13, 1958 and March 13, 1959, by Reginald R. Clark, president of defendant's employer, that defendant had "faked" the claim for compensation. Shortt further testified at said formal hearing that he advised plaintiff of said conversation about a year to a year and one-half after May 13, 1958, or between May 13, 1958 and November 13, 1959.

7. Notwithstanding receipt of the aforesaid information regarding defendant's alleged fraudulent claim, plaintiff continued to pay monies to defendant, and, in addition, voluntarily paid on defendant's behalf medical expenses in the amount of $3,330.75, said payments having been made between November, 1959 and May 1, 1961.

BINDEMAN AND BURKA

By /s/ Leonard W. Burka

Attorneys for Defendant
606 Landmark Building
Washington 5, D. C.

[CERTIFICATE OF SERVICE]

[Filed October 14, 1965]

ORDER

This matter having come before the Court on cross motions for summary judgment and upon consideration of said motions together with the points and authorities and memorandum filed herein and after argument of counsel for the respective parties in open Court, it is by the Court, this 14th day of October, 1965,

ORDERED, that the defendant's motion for summary judgment be and hereby is denied.

FURTHER ORDERED, that the plaintiff's motion for summary judgment be and hereby is granted in the amount of $14,465.32 plus interest and costs of this suit.

/s/ George L. Hart, Jr.
JUDGE

[CERTIFICATE OF SERVICE]

[Filed October 26, 1965]

MEMORANDUM

This matter came on for hearing on cross motions for summary judgment on August 5, 1965 and argument of counsel was had. The Court requested counsel to submit additional memoranda on the question of whether or not the Statute of Limitations is a bar to plaintiff's action.

Statute of Limitations has not run.

The law is well settled that in an action for fraud, the Statute of Limitations begins to run not when the fraud was committed but from the discovery of the facts out of which the claim arose. In the case at bar the defendant's fraud is well established and consisted of collecting Workman's Compensation benefits from plaintiff for an alleged injury of May 13, 1958 which alleged injury, in fact, never occurred.

Defendant asserts that plaintiff's claim is barred by the three year Statute of Limitations and bases his claim entirely on certain testimony of his insurance broker, one, Charles Shortt at the formal hearing before the District of Columbia Compensation Commission, Mr. Shortt testified that between November 13, 1958 and November 13, 1959, defendant's associate, one, Mr. Clark, stated to Mr. Shortt that defendant's claim was faked. Mr. Shortt further testified that between May 13, 1959 and November 13, 1959, he, Shortt, passed this information to the plaintiff.

The record shows that Mr. Clark would not confirm any such conversation and even under oath at the formal compensation hearing, insisted that he could not remember ever having had any such conversation with Mr. Shortt.

The Court's attention is invited to the fact that defendant's claim was one under the Workmen's Compensation Statute under which all doubts are resolved in favor of the claimant (defendant here). Plaintiff can not presently be charged with previous knowledge of the fraud on the basis of one unsupported statement of hearsay by one insurance broker, which very statement would not be admitted by its alleged maker, Mr. Clark. Such unsupported hearsay allegation was made in the face of defendant's continual assertion of the truth of his position and his claim of an industrial accident in repeated conferences before trial examiners of the compensation commission, all of whom issued recommendations that the plaintiff made payments.

The first opportunity plaintiff had to become knowledgable that a fraud had been perpetrated was at the formal hearing before the Deputy Commissioner when for the first time defendant produced certain hospital records and medical records and where testimony, lay and expert, was for the first time taken under oath.

For the first time plaintiff had an opportunity to review hospital records which were offered in evidence by the defendant (claimant) which records revealed histories of other accidents both previous and subsequent to the alleged industrial accident of May 13, 1958, and which were contrary to the claimant's representations upon which plaintiff had relied. (T.R. Exhibit - 1, 2, 3, 4, & 5) Such information had never been available to plaintiff prior to the hearing and was in direct conflict with the represenations of defendant prior to the hearing and under oath at the hearing.

The hospital records revealed for the first time that when defendant was hospitalized following the date of the alleged industrial accident, he gave no history of accident or injury but contrary thereto reported that on May 16, 1958 not May 13, 1958, he felt pain which appeared suddenly in his left shoulder, and during his entire period of hospital admission made no mention of the alleged industrial injury of May 13, 1958.

The said records offered by defendant at the hearing also appraised plaintiff for the first time that defendant had suffered a back injury subsequent to the date of the alleged industrial accident for which he was hospitalized and underwent traction.

The hospital records further revealed to plaintiff for the first time that when defendant re-entered the hospital for treatment of the lumbar spinal epidural abscess and laminectomy, he made no mention of the alleged industrial accident of May 13, 1958, but rather gave a history of being struck by a twenty pound spot light lamp on approximately May 9, 1961.

At the hearing the defendant testified that he had no difficulty with his should prior to May 13, 1958, the date of the alleged industrial accident and a written medical report was available indicating treatment to the left shoulder from January 30, 1958 to February 18, 1958. He further testified that between May 13, 1958 and June 20, 1961 (date he re-entered hospital) he had no subsequent accidents, and the hospital records admitted to evidence revealed a history during that period of injury, hospitalization, traction and subsequent discharge from the hospital on May 26, 1961, nearly a month prior to that re-entry into the hospital.

For the first time at hearing, the defendant was heard under oath and his testimony evaluated in light of the other sworn testimony and documentary evidence most of which had never been available to plaintiff prior to that time.

The defendant testified that he did not mention his alleged accident and injury to Mr. Clark, his associate, at the time of the accident and for sometime following the accident, the employer's report signed by Mr. Clark having been filed some four or five months following the alleged accident date. Mr. Clark, on the other hand, testified that he was informed by defendant the day of the alleged accident, immediately thereafter and further tesitifed to a substantially different set of facts as to how the accident occurred. T.R. 17,262, 263, 268.

The opportunity of a formal hearing made available to plaintiff for the first time, not only hospital records and the opportunity to obtain testimony under oath, but also, for the first time plaintiff was afforded a capsule view of the collective facts surrounding defendant's claim. With a documented medical history of the defendant coupled with the oral testimony available, plaintiff was for the first time able to grasp an understanding that defendant's prior representations upon which it had been relying were without basis in fact and that plaintiff had been the victim of a cleverly conceived and executed fraud.

It was at that point in defendant's masquerade of deceit, January 31, 1963, that the Statute of Limitations began to run. At that point, plaintiff for the first time was in a position to have fact before it and was no longer limited to relying completely for its information upon the representations of defendant himself. Prior to that time information and the flow of information was controlled entirely by defendant through his own statements; data of his employer, the corporation of which he was half owner and medical history, the release of which was limited to defendant as privileged information.

Defendant is estopped to plead Statute of Limitations.

It is the general rule that a defendant who intentionally or negligently misleads a plaintiff by his misrepresentations and causes him to delay suing until the statutory bar has fallen will be estopped from pleading the Statute of Limitations.

The concealment of a cause of action by misleading the plaintiff or hiding from him the fact that the cause has arisen, whether fraudulent or not, will estop the defendant to plead the statute. (Am. Jur. Limitations of Action, #420)

This rule is applied in both tort and contract. At 77 ALR 1045, the subject is treated extensively and numerous cases are cited in support of the following,

> "Where an action in tort is controlled by an ordinary statute of limitation, which limits the remedy only, a litigant may estop himself from the right to plead the statute."

In McLearn v. Hill 177 N.E. 617 and treated at 77 ALR 1039, the Court stated the following:

> "Where a cause of action is recognized by common law, the statute is not of the essence of the cause of actions, and a limitation upon the right. The statute is a mere restriction upon the remedy.

> It must be pleaded and if not pleaded it is waived. It may be waived by other conduct amounting to the relinquishment of a known right . . . . . It is in the main to accomplish the prevention of results contrary to good conscience and fair dealing that the doctrine of estoppel has been formulated and taken its place in the law. It has been said that, "In order to work an estoppel, it must appear that one has been induced by the conduct of another to do something different from what otherwise would have been done and which has resulted to his harm and that the other knew or had reasonable cause to know that such consequence might follow."

In Morrison v. Baltimore and Ohio Railroad Co., 40 App. D. C. 391, the Court did not estop the defendant from pleading the Statute of Limitations because the particular tort involved was a product of statute (employers liability act) and the statute limited the right. However, the Court did recognize that in a common law tort the ordinary statute of limitations only goes to the remedy and estoppel could run against the defendant. The Court there commented.

> "Plaintiff seeks to invoke the well recognized rule that when a defendant, who relies upon an ordinary statute of limitations, has previously been guilty of deception or violation of duty toward the plaintiff, causing him to subject his claim to the statutory bar, such a defendant will be held to have wrongfully obtained an advantage which, in good conscience he is estopped to hold or plead."

In P. H. Sheeby Co. v. Eastern Importing & Mfg. Co. 44 App. D. C. 107, the Court stated the following.

> "Statutes of Limitations were inacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, exhausted or extinguished if they did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the Statute of Limitations to protect it, is to make the law which was designed to prevent fraud, the means by which it is made successful and secure."

In White v. Piano Mart 110 A2d 542, the Court said,

> "The Statute was intended to prevent fraud, not to help perpetrate it by concealing some material fact until such time had passed when the party committing the fraud could plead the statute."

The record shows that during the entire period of time through which defendant now claims the statute was running, the defendant was asserting the truth of his fraud and by deception, concealment of medical records and false representations concerning both his prior and subsequent health and hospitalization, mislead plaintiff into accepting the truth of his representations. Defendant through that deception and violation of duty to the plaintiff now attempts to wrongfully obtain the advantage referred to in Morrison v. Baltimore & Ohio Railroad Co. (supra) and is estopped by the law from relying upon the Statute of Limitations to further his fraud. He cannot be permitted to make the law and the Courts parties to his fraud and

wrongfully use the law to accomplish that very end which it is the purpose of the law to protect against. The doctrine of estoppel was conceived to right the very type wrong which this defendant is attempting to accomplish and should be invoked here to prevent a complete mockery of justice. If estoppel to plead the Statute of frauds in an action for fraud is ever proper, it lies in the case at bar.

M. S. MAZZUCHI

BY: /s/ John F. Gionfriddo
Attorneys for Plaintiff

[CERTIFICATE OF SERVICE]

[Filed October 28, 1965]

NOTICE OF APPEAL

Notice is hereby given this 28th day of October, 1965, that defendant hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 14th day of October, 1965, in favor of plaintiff against said defendant.

BINDEMAN AND BURKA

By: /s/ Leonard W. Burka
Attorney for defendant
606 Landmark Building
1343 H Street, N. W.
Washington 5, D. C.

[Filed November 8, 1965]

ORDER

Upon consideration of defendant's motion to stay the execution of the judgment herein pending appeal by the posting of a cash supersedeas bond herein, and it further appearing that the plaintiff herein consents to such stay of execution pending appeal, conditioned upon defendant giving a cash supersedeas bond in the sum of $16,000.00, it is by the Court this 8th day of November, 1965,

ORDERED, ADJUDGED AND DECREED:

That the judgment of this Court of October 14, 1965 is stayed pending appeal, provided that defendant file within five days from the date hereof a cash supersedeas bond with the Clerk of this Court in the sum of $16,000.00 conditioned for the satisfaction of the judgment in full, with costs, interest and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellant court may adjudge and award.

/s/ George C. Hart
JUDGE

Consent:

/s/ M. S. Mazzuchi
Attorney for Plaintiff

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,821

ERNEST J. FONTANA, *Appellant*,

v.

AETNA CASUALTY AND SURETY COMPANY, *Appellee*.

Appeal from the United States District Court for the District of Columbia

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M. S. MAZZUCHI
JOHN F. GIONFRIDDO
405 Investment Building
Washington, D. C. 20005
Attorneys for Appellee

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

QUESTIONS PRESENTED

1. Was Appellee's claim barred by the Statute of Limitations on the basis of a hearsay allegation which was denied by its alleged maker?

2. Is Appellant estopped to plead the Statute of Limitations?

3. Was a question of fact presented at the hearing on cross motions for summary judgment?

4. Were payments by Appellee to Appellant made with knowledge by Appellee that it was being defrauded?

5. Was Appellee's claim a compulsory counterclaim required to be presented in Appeal to United States District Court from the Workmen's Compensation Commission?

INDEX

TABLE OF CASES

* Authorities chiefly relied upon.

TEXTS

STATUTES AND RULES

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,821

ERNEST J. FONTANA, *Appellant,*

v.

AETNA CASUALTY AND SURETY COMPANY, *Appellee.*

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This case arises out of a workmen's compensation claim originally filed by the Appellant herein against the Appellee, the workmen's compensation carrier for Appellant's employer. Appellant's employer was a closely held corporation owned by the Appellant and one other individual in which the Appellant served as Secretary-Treasurer.

In substantiation of his said claim, the Appellant represented to Appellee and to the Bureau of Employee's Compensation, United States Department of Labor that he had suffered an industrial accident while in the course of his employment on May 13, 1958; that the said accident resulted in an injury to his shoulder and back and precipi-

tating certain further disabilities. The employer's report of accident submitted by the Appellant documented Appellant's allegation of injury.

Pursuant to the established procedures, informal conferences were held before claims examiners of the Bureau of Employee's Compensation, United States Department of Labor at which the Appellant appeared and made representations in support of his calim.

As a result of Appellant's claim and representations in support thereof, the Appellee paid to Appellant, workmen's compensation in the amount of Nine Thousand One Hundred Sixty-four and 57/100 ($9,164.57) Dollars, medical expenses on behalf of Appellant in the amount of Three Thousand Three Hundred Thirty and 75/100 ($3,330.75) Dollars and incurred additional expenses directly relating theerto in the amount of One Thousand Nine Hundred Seventy ($1,970.00) Dollars.

Following such payment Appellant attempted to reopen his claim asserting the need for additional medical treatment as a result of the originally claimed accident of May 13, 1958. Appellee controverted Appellant's claim pursuant to procedures established by the Workmen's Compensation Law, said controversion culminating in a formal hearing before the Deputy Commissioner.

The Deputy Commissioner entered an order in favor of the Appellee herein.

In pertinent part the Deputy Commissioner made findings of fact as follows:

(a) The testimony of the claimant (Appellant herein) was inconsistent and was deemed incredible.

(b) That the claimant (Appellant herein) did not sustain a personal injury on May 13, 1958 as alleged.

Defendant thereupon brought in the United States District Court for the District of Columbia, Civil Action No.

1114-63, *Fontana* v. *Einbinder* in which suit the Appellee herein intervened as a party defendant.

Following the cross motions for summary judgment, a memorandum opinion was issued by the Court on December 6, 1963, which read in pertinent part,

> ". . . the Court is of the opinion that the record as a whole supports the Deputy Commissioner's findings that plaintiff did not sustain an injury on May 13, 1958 as alleged."

The motions of defendants, the Deputy Commissioner and Aetna Casualty & Surety Company, Appellee herein, were granted and the motion of Ernest J. Fontana, Appellant herein, was denied.

Appellee then brought this action for the return of the funds paid to and on behalf of the Appellant as the result of Appellant's fraud and misrepresentation in presenting his claim.

Cross motions for summary judgment were heard and the Court requested counsel to submit additional memoranda on the question of the Statute of Limitations following which Appellee's motion was granted and Appellant's motion was denied. This appeal followed.

STATUTE INVOLVED

44 Stat. 1424; 33 USC 901 et seq.

Sec. 921 (b)

. . . a compensation order may be suspended, set aside, in whole or in part, through injunction proceedings, mandatory or otherwise brought by any party in interest against the Deputy Commissioner making the order, and instituted in the Federal District Court for the Judicial District in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occured in the District.)

SUMMARY OF ARGUMENT

1. Appellee's claim was not bared by the Statute of Limitations. The first opportunity that Appellee had to be reasonably appraised of sufficient information from which to infer that a fraud had been perpetrated was at the time of formal hearing, before the Compensation Commission. Prior to that time the truth of the facts had been suppressed by Appellant and inasmuch as Appellant was one of the two owners of the Appellant's corporate employer, Appellee was also denied the truth from the employer, Appellee's own insured. A single hearsay remark, which the alleged maker would not admit to having made, is hardly sufficient to begin the running of the Statute of Limitations in the face of all the facts of the case.

2. Appellant is estopped to plead the Statute of Limitations having intentionally deceived and misled the Appellee and thereby carefully concealing from Appellee the very fraud which gave rise to the case of action. Being guilty of deception and violation of his duty toward Appellee, causing Appellee to subject its claim to the statute, Appellant cannot now be permitted to benefit from the legal advantage he so wrongfully obtained. Appellant having committed a fraud in a manner by which it concealed itself until he could come under the protection of the Statute of Limitations is estopped from using as a means by which he can become secure in his fraud that very statute which was designed to prevent fraud in the first instance.

3. No question of fact was presented at the time of hearing in the Court below. This matter came on below on cross motions for summary judgment. Appellant like Appellee by the very nature of his motion proceeded on the basis that summary judgment could be granted by the Court because no question of fact existed. Having received an adverse ruling on his motion he cannot now be heard to say that questions of fact existed, the opposite of his assertion below.

4. Appellee did not make its payments to Appellant with knowledge that Appellant was defrauding it. The only information ever received by Appellee other than Appellant's fraudulent assertions of the truth of his position was the one isolated hearsay statement by Appellant's broker. That statement was that Appellant's associate told the broker that Appellant's claim was "faked." The associate when confronted with the statement not only refused to confirm the remark but would not even admit ever having had such a conversation with the broker. That same associate was the very person who executed the employer's report of accident on behalf of Appellant which enabled him to undertake his fraud. During the same period of time the Appellant admittedly represented the truth of his fraudulent allegations to Appellee, the Compensation Commission and the Court below.

5. Appellee's claim was not a compulsory counterclaim in Appellant's appeal to the District Court from the Compensation Commission's ruling. In sitting in review of the rulings of the Compensation Commission the District Court is performing a statutory function in the nature of an Appellate Court. It is limited by law in the scope of such review to the record of the Compensation Commission and the ruling of the Commisisoner. It may not go beyond a review of the Commissioner's ruling and consider any matters that were not at issue before the Commissioner. The Appellee was compelled by law to bring its claim in a separate action as it had no right to be heard by the District Court when sitting in its limited capacity as reviewer of the ruling of the Commissioner.

ARGUMENT

I.

Appellee's Claim Was Not Barred by the Statute of Limitations.

Appellant's assertion that Appellee's claim was barred by the Statute of Limitations is founded entirely on the isolated testimony of Appellant's insurance broker, one Charles Shortt at the formal hearing before the Compensation Commission. Mr. Shortt testified that between November 13, 1958 and November 13, 1959, Appellant's associate, Mr. Reginald Clark stated to Shortt that Appellant's claim was "faked", and that between May 13, 1959 and November 13, 1959, he, Shortt, advised a representative of the Appellee of that conversation with Mr. Clark. (J.A. 14)

The record is clear that Mr. Reginald Clark would not confirm having made any such statement to Mr. Shortt and even under oath at the formal hearing before the Compensation Commission insisted that he could not even remember ever having had such a conversation with Mr. Shortt. (J.A. 14)

Mr. Clark was one-half owner as was Appellant of the corporation listed as Appellant's employer and is the same Mr. Clark who filed the original employer's report of accident in substantiation of Appellant's fraudulent claim. (J.A. 16)

During this same period, Appellant continually asserted the truth of his claim and his representations in support thereof.

Appellee can not now be charged with the requisite knowledge required in law on a single unsupported hearsay statement that was denied by the very person who was credited with its utterance. This is especially so when the matter involved was one of Workmen's Compensation, where all doubts are resolved in favor of the claimant (Appellant), and in the face of Appellant's continuing and

running fraud. Appellant continued to assert the truth of his fraudulent representation not only during that period of time he now claims started the statute running but even under oath through Formal Compensation Hearing and on appeal to the Court below some four (4) years running.

The record shows that the first time Appellee had any sound information from which to infer that a fraud had been committed was at the formal hearing before the Compensation Commission on December 13, 1962 and January 31, 1963. Prior to that time the only information was the one unsupported statement of hearsay, denied by its alleged maker.

At formal hearing, Appellee for the first time had the opportunity to review hospital records offered in evidence by Appellant (claimant there) which records revealed histories of other accidents both previous and subsequent to the alleged industrial accident of May 13, 1958 and which were contrary to Appellant's representations upon which Appellee had relied. Such information had never been available to Appellee prior to hearing and was in direct conflict with the representations of Appellant prior to the hearing and under oath at the hearing. (J.A. 15)

The hospital records revealed for the first time that when Appellant was hospitalized following the date of the alleged industrial accident, he gave no history of accident or injury but contrary thereto reported that on May 16, 1958 not May 13, 1958, he felt pain which appeared suddenly in his left shoulder, and during his entire period of hospital admission made no mention of the alleged industrial injury of May 13, 1958. (J.A. 15)

The said records offered by Appellant at the hearing also apprised Appellee for the first time that Appellant had suffered a back injury subsequent to the date of the alleged industrial accident for which he was hospitalized and underwent traction. (J.A. 15)

The hospital records further revealed to Appellee for the first time that when Appellant re-entered the hospital for treatment of the lumbar spinal epidural abscess and laminectomy, he made no mention of the alleged industrial accident of May 13, 1958, but rather gave a history of being struck by a twenty pound spot light lamp on approximately May 9, 1961. (J.A. 15)

At the hearing the Appellant testified that he had no difficulty with his shoulder prior to May 13, 1958, the date of the alleged industrial accident and a written medical report was available indicating treatment to the left shoulder from January 30, 1958 to February 18, 1958. He further testified that between May 13, 1958 and June 20, 1961 (date he re-entered hospital) he had no subsequent accidents, and the hospital records admitted to evidence revealed a history during the period of injury, hospitalization, traction and subsequent discharge from the hospital on May 26, 1961, nearly a month prior to that re-entry into the hospital. (J.A. 16)

For the first time at hearing, Appellant was heard under oath and his testimony evaluated in light of the other sworn testimony and documentary evidence most of which had never been available to Appellee prior to that date. (J.A. 16)

The Appellant testified that he did not mention his alleged accident and injury to Mr. Clark, his associate, at the time of the accident and for sometime following the accident, the employer's report signed by Mr. Clark having been filed some four or five months following the alleged accident date. Mr. Clark, on the other hand, testified that he was informed by Appellant the day of the alleged accident, immediately thereafter and further testified to a substantially different set of facts as to how the accident occurred. (J.A. 16)

The opportunity of a formal hearing made available to Appellee for the first time, not only hospital records and

the opportunity to obtain testimony under oath, but also, for the first time Appellee was afforded a capsule view of the collective facts surrounding Appellant's claim. With a documented medical history of the Appellant coupled with the oral testimony available, Appellee was for the first time able to grasp an understanding that Appellant's prior representations upon which it had been relying were without basis in fact and that Appellee had been the victim of a cleverly conceived and executed fraud. (J.A. 16)

It was at that point in Appellant's masquerade of deceit, January 31, 1963, that the Statute of Limitations began to run. At that point, Appellee for the first time was in a position to have fact before it and was no longer limited to relying completely for its information upon the representations of Appellant himself. Prior to that time information and the flow of information was controlled entirely by Appellant through his own statements; data of his employer, the corporation of which he was half owner and medical history, the release of which was limited to Appellant as privileged information. (J.A. 17)

It is fully agreed by both parties that in cases of fraud the Statute of Limitations begins to run not necessarily when the act is committed but from discovery of the facts or the time when the facts should have reasonably been found out in the exercise of due diligence.

In the case at bar the commission of the act was a continuing thing commencing with presentation of the compensation claim and kept alive by Appellant by his continuing fraudulent acts for a five year period running through appeal from the Compensation Commission to the Court below.

That time when the facts could reasonably have been found out was that time when the information was available to Appellee at formal hearing. Prior to that time the information surrounding the facts was in the control of

the Appellant. The Appellant being his own employer in a sense, and the co-owner of the Appellant's employer corporation, Mr. Clark who executed the report required of an employer in order for an employee to make his claim.

The Court's attention is invited to the fact that Appellant's employer corporation which operated through Appellant and Mr. Clark, was the actual insured of Appellee. Normally Appellee would have presumably had that all important element of cooperation from its own insured in such matters, whereas in the case at bar the information flow, veracity and cooperation of the insured was controlled by the very perpetrator of the fraud, the Appellant himself.

The facts could not reasonably have been found out on the information available to Appellee prior to hearing since peculiar to this case the facts were in control of the perpetrator of the fraud and the test is reasonableness.

All the facts considered the Court below correctly entered judgment on behalf of Appellee.

II.

Appellant Is Estopped to Plead the Statute of Limitations.

It is the general rule that a defendant who intentionally misleads a plaintiff by his misrepresentations and causes him to delay suing until the statutory bar has fallen will be estopped from pleading the Statute of Limitations. The concealment of a cause of action by misleading the plaintiff or hiding from him the fact that the cause has arisen, whether fraudulent or not, will estop the defendant to plead the Statute. (Am. Jur. Limitations of Actions #420)

If the action is a creature of statute, the limitation imposed by the statute is a limit of the right as well as the remedy and the doctrine of estoppel will not apply. However, if the action, as in the case at bar, is one recognized at common law, the Statute of Limitations limits the remedy

only and not the right and the doctrine of estoppel is applicable.

In the case at bar, the action is one sounding in fraud and the Statute of Limitations runs only to the remedy. Appellant by his continuing fraud could and did estop himself from pleading the Statute of Limitations.

This rule is applied in both tort and contract. At *77 ALR 1045*, the subject is treated extensively and numerous cases are cited in support of the following.

> "Where an action in tort is controlled by an ordinary statute of limitation, which limits the remedy only, a litigant may estop himself from the right to plead the statute."

In *McLearn* v. *Hill*, 177 N.E. 617 and treated at 77 ALR 1039, the Court stated the following:

> "Where a cause of action is recognized by common law, the statute is not of the essence of the cause of actions, and a limitation upon the right. The statute is a mere restriction upon the remedy. It must be pleaded and if not pleaded it is waived. It may be waived by other conduct amounting to the relinquishment of a known right . . . It is in the main to accomplish the prevention of results contrary to good conscience and fair dealing that the doctrine of estoppel has been formulated and taken its place in the law. It has been said that, 'In order to work an estoppel, it must appear that one has been induced by the conduct of another to do something different from what otherwise would have been done and which has resulted to his harm and that the other knew or had reasonable cause to know that such consequence might follow".

In *Morrison* v. *Baltimore and Ohio Railroad Co.*, 41 App. D. C. 391, the Court did not estop the defendant from pleading the Statute of Limitations because the particular tort involved was a product of statute (employer's liability act) and the statute limited the right. However, the Court did

recognize that in a common law tort the ordinary statute of limitations only goes to the remedy and estoppel could run against the defendant. The Court there commented.

> "Plaintiff seeks to invoke the well recognized rule that when a defendant, who relies upon an ordinary statute of limitations, has previously been guilty of deception or violation of duty toward the plaintiff, causing him to subject his claim to the statutory bar, such a defendant will be held to have wrongfully obtained an advantage which, in good conscience he is estopped to hold or plead."

Appellant in support of his position that the Statute of Limitations is a bar to Appellee's recovery relies in part on *P. H. Sheeby Co.* v. *Eastern Importing & Mfg. Co.*, 44 App. D. C. 107 and *White* v. *Piano Mart*, 110 A. 2d 542. In both of these cases the Courts went beyond that point relied upon by Appellant.

In *P. H. Sheeby* the Court wrote,

> "Statutes of Limitations were inacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, exhausted or extinguished if they did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the Statute of Limitations to protect it, is to make the law which was designed to prevent fraud, the means by which it is made successful and secure."

In *White* v. *Piano Mart* the Court stated,

> "The Statute was intended to prevent fraud, not to help perpetrate it by concealing some material fact until such time had passed when the party committing the fraud could plead the statute."

III.

No Questions of Fact Were Presented on the Hearing on Cross Motions for Summary Judgment Below.

The record shows that at the time of hearing in the Court below both parties filed motions for summary judgment (J.A. 4 through 12)

In moving the Court to grant summary judgment, Appellant, from the very nature of his motion, must conceed that no question of fact exists. The Court may not grant summary judgment if factual questions remain unanswered. Rule 56 (c) of the Federal Rules of Civil Procedure, reads in part,

> . . . the judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file together with the affidavits, if any, show that *there is no genuine issue as to any material fact* . . . (emphasis added)

Appellant cannot be heard to ask the trial court for summary judgment alleging no question of material fact and then receiving an unfavorable ruling there, ask relief of the Appellate Court on grounds that the nonexistant material fact existed.

Appellant offers as the question of fact the establishment of the time when Appellant was in fact knowledgable that the fraud had been committed. Stated another way, when did the Statute of Limitations begin to run.

The record on these matters was and is complete and was available to the Court by means of the previous action Fontana v. Einbinder Civil Action No. 1114-63 and the transcripts and orders contained therein, all of which were incorporated in the original complaint filed in the case at bar in the Court below. (J.A. 1 & 2)

IV.

Payments Were Not Made by Appellee to Appellant With Knowledge of the Fraud.

The fraud of Appellant was initially the claim of injury resulting from an industrial accident on May 13, 1958 which alleged accident and injury, in fact, never occurred. That fraud continued through the acceptance of medical benefits any payments of compensation; the request for additional medical benefits, which percipitated the formal compensation hearing and appeal to the court below from the compensation commission ruling.

Workment's compensation establishes liability without fault. It is not an advisary proceeding of the sense that fault or casuality is litigated. The normal processing of the multitude of claims produced by modern industry necessitates initially no more than the determination that an industrial accident has, in fact, occurred. To this end a compensation carrier is completely dependent upon its insured and the fellow employees of the claimant in establishing the happening of the accident. In the case at bar Appellant was employed by a two man corporation of which he was one of the two men. (J.A. 5) His only fellow employee was the other of the two, a Mr. Reginald Clark who executed, as employer on behalf of the corporation, the report substantiating Appellant's fraudulent claim of accident and injury. (J.A. 16)

The hearsay statement that Appellant's claim was "faked" was attributed to the same Mr. Clark who subsequently denied having made it. (J.A. 14)

Appellee cannot be said to have been knowledgable of the fraud on the basis of that one isolated hearsay statement in the face of all the surrounding circumstances. The parties were dealing in an area legislated for the social good and where all doubts are rightfully resolved in favor of the party presenting the claim of injury. To impute knowledge

to Appellee and expect it to have cried fraud on the basis of one slim thread of unsupported hearsay is to impose a greater duty on Appellee than the law demands of it in this area. To so hold the law would be to require compensation carriers to deny much needed medical assistance and compensation to injured workmen everytime someone cries foul or fake or malingerer whether supported or not, or otherwise risk the loss of their funds on the theory that they should have known.

The facts in the case at bar are clear. Appellant repeatedly asserted the truth of his claim and cleverly continued to withhold the truth from Appellee through use of the corporate structure of his employer and his position of control therein. It is completely incredible that he would now impute knowledge of his fraud to Appellee having been so careful throughout their entire relationship, to insure that Appellee be denied the true facts.

V.

Appellee's Action for Fraud Was Not a Compulsory Counterclaim in the Appeal of Appellant's Compensation Claim to the Court Below.

Defendant asserts that the plaintiff's claim was in the nature of a compulsory counterclaim in *Fontana* v. *Einbinder,* Civil Action No. 1114-63 in which plaintiff here intervened as a party defendant.

That action was brought by Appellant here as plaintiff for the purpose of judicial review of the ruling of the Deputy Commissioner in the compensation hearing before the Workmen's Compensation Commission.

Such action is taken under section 21 (a) of the Workmen's Compensation Act for the District of Columbia, Longshoremen's and Harbor Workers Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C. Section 901 et seq. for the sole purpose of challenging the findings of the

Deputy Commissioner. It is not a trial de novo and does not entitle either party to a trial de novo, nor does it entitle either party to be heard on matters other than the Commissioner's ruling.

It has repeatedly been held that in such review the District Court is limited in the scope of its review to the determination of whether or not the evidence produced at hearing is sufficient to support the findings of the Commissioner. The parties may not be heard on issues not raised before the Deputy Commissioner.

In *Wetzel* v. *Britton*, 83 App. D.C. 327, 170 F. 2d 285, the Court stated the following:

> "... we find in the instant case controlled by the recent decision of this Court in *Hurley* v. *Louie*, 83 U.S. App. D.C. 123, 168 F. 2d 553, wherein the Supreme Court opinion in *Cardielo* v. *Liberty Mutual Co.*, 330 U.S. 469, 67 S. Ct. 801 was construed. This Court held that the Supreme Court has apparently restricted the function of a reviewing court in Workmen's Compensation cases so narrowly that we may examine a particular case only with the purpose of determining whether the Deputy Commissioner's conclusion is forbidden by law or without any reasonable legal basis."

In *Lockheed Overseas Corporation* v. *Pillsbury*, 52 F. Supp. 997, it was held that:

> "A review of Commissioner's action under this chapter should be limited to Commissioner's order and the findings."

In sitting in judicial review of the Commissioner's order in *Fontana* v. *Einbinder*, Civil Action No. 1114-63, the District Court was performing a function created for it by statute and was acting in the nature of an Appellate Court. Its function was limited to the review of the Commissioner's findings and it could not entertain the presentation of matters not previously at issue before the Commissioner,

not contained in the record before it and constituting a separate and distinct legal action. Appellee was precluded by the very nature of the judicial review from raising the question of Appellant's fraud and could be heard on that question only by means of a separate action.

CONCLUSION

It is respectfully submitted that the facts and law fully considered the judgment of the Court below is proper and should be affirmed.

Respectfully submitted,

M. S. Mazzuchi

John F. Gionfriddo

Attorneys for Appellee

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,821

ERNEST J. FONTANA, *Appellant*,

v.

AETNA CASUALTY AND SURETY COMPANY, *Appellee*.

OPPOSITION TO PETITION FOR REHEARING AND/OR REHEARING EN BANC

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ERNEST J. FONTANA, *Appellant*,

v.

AETNA CASUALTY AND SURETY COMPANY, *Appellee*.

OPPOSITION TO PETITION FOR REHEARING AND/OR REHEARING EN BANC

I.

COUNTERSTATEMENT OF FACTS

On August 19, 1958, Appellant filed a Workmens Compensation claim against his employer and Appellee, who was the Workmens Compensation Insurance Carrier for the employer. Appellant's employer was a two man corporation, the capital stock of which was owned equally by Appellant himself and one Reginald Clark. Clark was President and Appellant was Secretary-Treasurer.

In his claim, Appellant alleged that some three months earlier on May 13, 1958, he had suffered an industrial accident on the corporate premises. The employer's report of

accident filed with the Workmens Compensation Commission in substantiation of Appellant's claim was executed by Reginald Clark, the previously mentioned President of the corporation.

Following conferences before examiners of the Workmens Compensation Commission, Appellee paid Appellant $9,164.57 in compensation and $3,330.75 as medical expenses.

Subsequent to the said payments, Appellant attempted to reopen his claim asserting the need for additional medical treatment. Appellee controverted that claim which resulted in a formal compensation hearing.

The Deputy Commissioner at formal hearing ruled that there had been no industrial accident involving Appellant on the date alleged.

Appellant then brought in the United States District Court for the District of Columbia, Civil Action 1114-63, Fontana v. Einbinder as a result of which the Court found that the record supported the Deputy Commissioner's finding that the alleged accident had never occurred.

Appellee then brought this action in the lower Court.

II.

ARGUMENT

Appellant's contention that a factual question existed concerning the Statute of Limitations revolves completely around the testimony before the Deputy Commissioner of one Charles Shortt, the isurance broker who placed Appellant's and Clark's compensation insurance with Appellee. Shortt testified that some six to ten months after May 13, 1958, Clark told him in a telephone conversation that Appellant's claim "was faked" and that he, Shortt, reported the telephone conversation to a representative of Appellee between May 1959 and November, 1959. Testifying before the Deputy Commissioner on the same occasion, Clark re-

fused to substantiate the testimony of Shortt concerning any such telephone conversation.

Appellee then had at most a simple hearsay remark of Clarks personal conclusion which remark the alleged maker, Clark himself, would not admit having made. Clark had executed the employer's report of accident substantiating Appellant's claim and Appellant represented that there were no witnesses to the alleged accident.

As the Majority pointed out in its opinion,

> "Thus the hearsay information given to Aetna by Shortt contained no statement of fact which the insurance company could investigate. That Fontana was actually hospitalized and treated on several occasions for a serious condition in his left shoulder was true, so there was only one way he could have faked his claim, by falsely representing that his condition was caused by a compensable injury suffered May 13, 1958 when, in fact, no such injury occurred."

In the complete exercise of due diligence, Appellee was still limited to Appellant himself and Clark for its information concerning the subject matter of the fraud which was the occurrence or non-occurrence of the alleged industrial accident. There being no witnesses to the alleged accident there were no fellow employees from whom information could be solicited. The nearest thing to another employee was Clark and he had filed the report on behalf of the corporation substantiating the accident. That report enabled Appellant to undertake his fraud.

Appellee could not look to its own policyholder the corporate employer, which it normally can expect to do, since Appellant in a practical sense was his own employer. The flow of information from the employer corporation was controlled by Clark and Appellant himself the very perpetrator of the fraud.

Thus by use of the Corporate structure of his employer and his position of control therein Appellant cleverly man-

aged to withhold the truth from Appellee while he executed his fraud. This he repeated and continued to do even after the date of the alleged hearsay remark continuing to accept compensation and treatment and through formal hearing and appeal of the Deputy Commissioner's ruling to the Court below.

There is no dispute that medical reports concerning Appellant's then current physical status were on file with the compensation commission. The fraud did not involve his physical condition or his need for treatment. That he was in need of medical care was true. The fraud involved whether or not his condition and need for treatment was the result of the alleged industrial accident which in fact never occurred.

It was not until the formal hearing before the Deputy Commissioner that complete evidence was available to establish the collective facts of Appellant's claim. Medical histories and reports were produced for the first time establishing that Appellant had given histories to others which were contrary to his claim. Appellee for the first time had the opportunity to review hospital records offered in evidence by Appellant which revealed histories of other accidents both previous and subsequent to the alleged industrial accident of May, 1958 and which were contrary to Appellant's representations upon which Appellee relied.

The hospital records revealed for the first time that when Appellant was hospitalized following the date of the alleged industrial accident, he gave no history of accident or injury but contrary thereto reported that on May 16, 1958 not May 13, 1958, he felt pain which appeared suddenly in his left shoulder, and during his entire period of hospital admission made no mention of the alleged industrial injury of May 13, 1958. (J.A. 15)

The said records offered by Appellant at the hearing also apprised Appellee for the first time that Appellant had

suffered a back injury subsequent to the date of the alleged industrial accident for which he was hospitalized and underwent traction. (J.A. 15)

The hospital records further revealed to Appellee for the first time that when Appellant re-entered the hospital for treatment of the lumbar spinal epidural abscess and laminectomy, he made no mention of the alleged industrial accident of May 13, 1958, but rather gave a history of being struck by a twenty pound spot light lamp on approximately May 9, 1961. (J.A. 15)

At the hearing the Appellant testified that he had no difficulty with his shoulder prior to May 13, 1958, the date of the alleged industrial accident and a written medical report was available indicating treatment to the left shoulder from January 30, 1958 to February 18, 1958. He further testified that between May 13, 1958 and June 20, 1961 (date he re-entered hospital) he had no subsequent accidents, and the hospital records admitted to evidence revealed a history during the period of injury, hospitalization, traction and subsequent discharge from the hospital on May 26, 1961, nearly a month prior to that re-entry into the hospital. (J.A. 16)

The Appellant testified that he did not mention his alleged accident and injury to Mr. Clark, his associate, at the time of the accident and for some time following the accident, the employer's report signed by Mr. Clark having been filed some four or five months following the alleged accident date. Mr. Clark, on the other hand, testified that he was informed by Appellant the day of the alleged accident, immediately thereafter and further testified to a substantially different set of facts as to how the accident occurred. (J.A. 16)

Appellant in his petition refers to the case of *Mescall* v. *W. T. Grant Co.*, 133 F. 2d 209.

> "Before the doctrine of estoppel may be invoked to prevent a defendant from relying upon the Statute of

> Limitations, the fraud must be of such a character as to prevent inquiry or to elude investigation or to mislead the party who has the cause of action."

That language describes with exactness the action of Appellant in this matter as is clearly shown on the record. Appellant claimed the occurrence of an accident to which there were allegedly no witnesses and then by use of the corporate structure of his employer and his position of control therein prevented inquiry and investigation and mislead Appellee.

The Majority pointed out in its opinion,

> "Not only did Fontana falsely represent that he was injured May 13, 1958 in his original Compensation claim; he repeated it many times in subsequent years, particularly in the formal hearing before the Deputy Commissioner. Each time he cashed a bi-weekly compensation check from Aetna he was in effect reiterating the falsehood. *So, that this was a continuing fraud; Fontana kept on representing to Aetna that he actually had been injured at work on May 13, 1958, a statement upon which Aetna necessarily had to rely until the formal hearing revealed its falsity. Thus, from time to time, Fontana's conduct caused Aetna to continue to rely on his original representation.*
>
> . . .
>
> This record discloses a cleverly conceived and boldly executed fraud to which judicial approval cannot be given. (emphasis added)

Appellant in his petition contends that the majority opinion establishes a binding precedent for future cases on a point of law likely to recur.

The majority here did no more than wisely apply the existing law to the record before it. Far from establishing new law in a case of first impression, it correctly applied the proper existing law to the record to prevent Appellant

from using the very law which was designed to prevent fraud, as a means by which his fraud could be made successful and secure. The opinion of the majority in no way changes existing law nor does it establish new precedent.

Appellant in his petition has also gone outside the record before this Court in reference to and partial quotes from items purported to be contained in the Compensation Commission files.

The data contains excerpts of writings by an examiner in a file. It consists of paraphrase by the examiner and contains opinions which are subject to different interpretations. The statements are not under oath, were not under oath when made, if made, and are not specific. They are as susceptable of application to isolated matters of a questionable medical nature in Appellant's claim as not.

Inclusion of such matters for consideration by this Court is improper and prejudicial to Appellee. They were not offered in the Court below, and are of such a nature as to have been excluded as inadmissible had they been offered. They were not the subject of argument at any previous stage of this action in the Court below or on appeal. Not having been available previously in this action they were not subject to review in their entire context as to applicability to the purpose for which it is now attempted to offer them.

Their admissibility at trial level would have been doubtful at best. They are not a part of the record before this Court and are improper for presentation to this Court even on appeal much less in the petition for rehearing. There is no end to the matters which could be offered an Appellate Tribunal if the parties are to be permitted to go outside the record and offer any and every comment and opinion expressed by those who may have had some exposure to the litigation.

CONCLUSION

It is respectfully submitted that the majority, in its opinion, wisely applied the existing law to the record on appeal in affirming the lower Court, and that petitioner's petition for a rehearing or a rehearing en banc be denied.

Respectfully submitted,

M. S. Mazzuchi
John F. Gionfriddo
Attorneys for Appellee

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,821

ERNEST J. FONTANA,

Appellant,

v.

AETNA CASUALTY AND SURETY COMPANY,

Appellee.

PETITION FOR REHEARING AND/OR REHEARING EN BANC

I.

PRELIMINARY STATEMENT

The judgment of the District Court granting appellee's Motion for Summary Judgment was affirmed by a three judge division of this Court.[1] Appellant respectfully suggests that the majority of the panel erroneously limited *Wiren v. Paramount Pictures, Inc.*, 92 U.S. App. D.C. 347, 206 F.2d 465 (1953), Cert. den. 74 S.Ct. 378, 346 U.S. 939, 98 L.Ed. 426,

[1] Fontana v. Aetna Casualty & Surety Co., No. 19,821, decided May 26, 1966 (Circuit Judge Fahy, dissenting).

and erroneously extended *Glus v. Brooklyn Eastern Terminal*, 357 U.S. 231 (1959).

For these reasons and because the opinion establishes a binding precedent for future cases before this Court on a point of law likely to recur, appellant respectfully urges the Court to rehear this case or, in the alternative, to rehear this case *en banc*.

The relevant facts are substantially as follows:

II.
FACTS

On August 19, 1958, appellant, an employee of the Clark-Fontana Paint Company, gave notice to appellee, insurance carrier, that he had sustained a certain injury on May 13, 1958, while in the course of his employment. Thereafter, appellant filed formal claim with the Bureau of Employees Compensation, hereinafter referred to as the "Bureau."

Pursuant to such claim, appellee paid appellant $9,164.57 as compensation, and $3,330.75 as medical expenses between October 8, 1958, and July 31, 1961. Appellee did not seek a formal hearing on this claim, but made such payments voluntarily and without any order of the Bureau.

After July 31, 1961, appellee refused to make any further payments to appellant or on his behalf. On May 1, 1962, appellant sought to reopen the proceedings by claiming compensation for continuing disability. This claim was denied by appellee and appellant thereupon requested the Bureau to hold a formal hearing. Such hearing was held on December 13, 1962, and January 31, 1963.

At the aforesaid hearing, Charles A. Shortt, insurance broker and agent of appellee, testified that the president of appellant's employer had told him some six to ten months after the accident, namely, between November 1958, and March 1959, that appellant's

claim was "faked." Shortt further testified that he reported this information directly to appellee about a year to a year and one-half after the accident, namely, between May 1959, and November 1959.

At the conclusion of the hearing, the Deputy Commissioner disallowed appellant's claim and, citing Shortt's testimony, made a finding "that the claimant (appellant) did not sustain a personal injury on May 13, 1958, as alleged."

On May 25, 1964, appellee filed suit herein demanding repayment from appellant of all monies paid on account of appellant's compensation claim. This suit was filed approximately six years after the appellee's agent was told the claim allegedly was "faked" and approximately five years after the appellee's agent admittedly informed the company that the president of appellant's employer had said the claim was faked. Nonetheless, the lower court held no issue of fact was presented and granted summary judgment for the appellee.

III.

ARGUMENT

The chief thrust of appellant's argument here was that, at the very least, a question of fact existed which precluded the District Court from granting appellee's motion for summary judgment. The question of fact was concisely set out by Circuit Judge Fahy in the dissenting opinion, as follows:

> "I would remand the case for trial because in my opinion a genuine issue of material fact was presented as to when the insurance company discovered the fraud or, exercising due diligence, should have discovered it."

The resolve of this question would determine the date on which the Statute of Limitations commenced to run.

The majority of the division recognized the rule in *Wiren v.*

Paramount Pictures, Inc., supra, wherein this Court stated (92 U.S. App. D.C. 348):

> "We agree that the statute of limitations had run and on that ground affirm the order dismissing the complaint. In an action for fraud the three year limitations contained in § 12-201, D.C. Code (1951), applies. District-Florida Corp. v. Penny, 1933, 62 App. D.C. 268, 66 F.2d 794."

The *Wiren* opinion continues:

> *"While the period begins only upon discovery of facts out of which the claim of fraud arises, or from the time such facts should reasonably have been ascertained in the exercise of due diligence* . . . the pleadings do not contain allegations within this rule so as to enlarge the three year period." (Emphasis supplied)

However, in the instant case the majority of the division held that the three year Statute of Limitations did not commence to run from the date Shortt, appellee's own agent, informed appellee that he had been informed that appellant's claim was "faked."

There is no dispute that appellee was so informed by Shortt not later than November 13, 1959, more than three years prior to appellee filing suit herein.

The majority opinion holds that Shortt's statement to appellee was merely hearsay and was not sufficient actual notice to appellee of fraud to start the Statute of Limitations to run. The majority opinion states:

> ". . . [appellant's employer] did not tell Shortt in what manner Fontana had faked the claim. Thus the hearsay information given to Aetna by Shortt contained no statement of fact which the insurance company could investigate."

The opinion further holds that such notice was not sufficient to require appellee to use due diligence in investigating appellant's

claim to discover the fraud. The majority of the division seeks to avoid *Wiren* by applying a "hearsay test" to the notice. However, *Wiren* sets no standard as to the judicial admissibility of such notice, but holds that the Statute of Limitations commences to run from the discovery of the fraud *or from the time such facts should reasonably have been ascertained in the exercise of due diligence.* The purport of the majority opinion was that actual knowledge that a claim may be fraudulent is not enough to put appellee to the exercise of due diligence to determine the truth. Appellant respectfully submits that such holding is erroneous. Such opinion is diametrically opposed to the holding of this Court in *P. H. Sheehy Company v. Eastern Importing & Mfg. Company,* 44 App. D.C. 107, 16 F. 810 (1915), wherein this Court held that in cases of fraud one ". . . must be diligent in informing himself upon the true state of affairs, culpable ignorance being offensive both in equity and at law."

Common experience dictated that when appellee was informed by its own agent of a "faked" claim it was required to instigate an immediate investigation to determine the truth of the matter.

The majority opinion holds that appellee's first knowledge of appellant's fraud came during the hearing on December 13, 1962, and January 31, 1963. Such opinion states:

> "At the hearing before the Deputy Commissioner, however, hospital and medical records, which had not theretofore been available to Aetna because of their confidential nature, were introduced and led the Deputy Commissioner to conclude that Fontana did not sustain an injury on May 13, 1958. It follows that Aetna's first knowledge of Fontana's fraud came during the hearing on December 13, 1962, and January 31, 1963, and that it could not sooner have learned the fact of falsehood, even had it fully credited the hearsay about Clark's accusation."

The majority of the division apparently determined this question of fact on the basis of hospital and medical records introduced at such hearings, which the division states had not theretofore been available to appellee.

Appellant respectfully submits that such determination of fact (the date upon which appellee could have learned of the fraud) could not properly be made by this Court, without benefit of trial, because the determination does not take into account the record of the Bureau which contains the following documents:

1. Medical report of Dr. Everett Gordon of examination of appellant made at appellee's request. Report filed October 13, 1958, 5 years and 7 months prior to the filing of the suit herein.

2. Medical report of Dr. Everett Gordon of examination of appellant made at appellee's request. Report dated January 30, 1959, 5 years and 4 months prior to the filing of the suit herein.

3. Medical report of Dr. F. A. Riley, Medical Advisor to the Bureau of Employees Compensation, of examination of appellant. Report dated April 22, 1959, 5 years and 1 month prior to the filing of the suit herein.

4. Medical report of Dr. Everett Gordon of examination of appellant made at appellee's request. Report dated April 30, 1959, 5 years and 1 month prior to the filing of the suit herein.

5. Medical report of Dr. Steven Oristion, appellant's physician, sent to appellee in response to appellee's request. Report dated May 6, 1959, 5 years prior to the filing of the suit herein.

6. Memorandum to file of Dorothy G. Brown, Bureau Claims Examiner, noting that Mr. Mohr of appellee's office had contacted Dr. Paul O'Donnell, appellant's physician, and discussed claimant's case. Memorandum dated June 16, 1959, 4 years and 11 months prior to the filing of the suit herein.

7. Medical report of Dr. J. A. Talbot to appellee of examination of appellant. Report dated June 26, 1959, 4 years and 11 months prior to the filing of the suit herein.

8. Medical report of Dr. Steven Oristion to appellee. Report dated July 27, 1959, 4 years and 10 months prior to the filing of the suit herein.

9. Memorandum to file of Dorothy G. Brown, Bureau Claims Examiner, which states, in part:

"Mr. Mazzuchi said that the carrier denied liability for this expense on the ground that the treatment was unauthorized and also that it was not necessitated by the injury but by an unrelated infectious process. He presented a report from Dr. Gordon in support of carrier's position which appeared to me to be merely a repetition of the opinion expressed by Dr. Gordon at the time he first saw the claimant, namely, that an infection could not have developed so quickly from trauma. Mr. Mazzuchi said that he would submit the report for the file when he had had a copy made. *He indicated that the carrier was considering reopening the entire question of causal relationship between the injury and the claimant's disability* * * * " (Emphasis supplied)

Memorandum dated March 14, 1961, of hearing held March 10, 1961, 3 years and 2 months prior to the filing of the suit herein.

10. Memorandum to file of Dorothy G. Brown, Bureau Claims Examiner, which states, in part:

"Mr. Mazzuchi said that the carrier will deny further liability in this case and intends also to reopen the whole question of its liability, since it is now convinced that the claimant's disability and need for medical treatment were not the result of an employment-connected injury, and that the carrier will probably contend that it was not liable for the benefits which it has previously paid. I reminded Mr. Mazzuchi that this question has been interjected before, but has been dropped. *He said that the carrier has never been satisfied on this point, but had decided to accept liability in the belief that the benefits heretofore claimed would dispose of the matter,* but that, in view of the additional claim and the probable potential future liability, it has now decided to reopen the whole matter, and that a formal hearing will probably

> be necessary to decide the issues." (Emphasis supplied)
>
> Memorandum dated March 26, 1962, of hearing held March 19, 1962, 2 years and 2 months prior to the filing of the suit herein.

The majority further held that appellant was estopped to plead the Statute of Limitations, citing *Glus v. Brooklyn Eastern Terminal, supra*. To apply the rule of *Glus* to the facts in this case extends the Supreme Court's ruling beyond what was intended.

In *Glus*, petitioner brought suit under the Federal Employer's Liability Act five years after he sustained his injury. The Statute of Limitations against such action is three years. Petitioner claimed that respondent was estopped from pleading the Statute of Limitations because respondent had induced the delay in the filing of the suit by *representing to petitioner that petitioner had seven years in which to sue*. The Supreme Court defined the narrow limits of the case, distinguishable from the instant case, with the following (3 L. Ed. 2d 773):

> "Despite the delay in filing his suit petitioner is entitled to have his cause tried on the merits if he can prove that respondent's responsible agents, agents with some authority in the particular matter, conducted themselves in such a way that petitioner was justifiably *misled into a good-faith belief that he could begin his action at any time within seven years after it had accrued.*" (Emphasis supplied)

In *Mescall v. W. T. Grant Co.*, 133 F.2d 209 (1943, C.A. 7), Cert. den. 319 U.S. 759, 87 L. Ed. 1711, 63 S. Ct. 1176, Reh. den. 320 U.S. 214, 87 L. Ed. 1851, 63 S. Ct. 1445, that Court held (133 F.2d 212):

> "Before the doctrine of estoppel may be invoked to prevent a defendant from relying upon the statute of limitations, the fraud must be of such a character as to prevent inquiry or to elude investigation or to mislead the party who has the cause of action."

In the instant case, appellee at no time was prevented from making full inquiry. On the contrary, the record before the Bureau is replete with correspondence and memoranda of medical investigations regarding appellant. Such memoranda further discloses that appellee, as early as March 10, 1961, 3 years and 2 months prior to filing of the suit herein, and at least one year and four months after receiving notice of the fraud from its agent Shortt, "considered" reopening the question of its liability. Such record further shows that appellant cooperated fully with appellee by making himself available for medical examination, so that it cannot be said that he prevented inquiry or eluded investigation.

It should also be remembered that the payments sought to be recovered here were paid voluntarily by appellee to appellant and without order of the Bureau. Appellee could have stopped or suspended compensation payments at any time during the course of such payments and the claim would have then gone to formal hearing[2] as it did in December, 1962, and January, 1963. It would appear from statements made by counsel for appellee before the Bureau that this was contemplated but forsaken in the interest of a quick disposal of the claim.

In any event, *Glus* is clearly answered by the dissenting opinion, which states:

> "The genuine issue of fact left undecided by the District Court emerged from prior testimony of the insurance broker that sometime between May 13, 1959, and November 13, 1959, more than four years before the action was filed, he advised appellee, the insurance company, that appellant's claim was faked. This raised an issue as to whether the insurance company had actual notice of the fraud, or 'in the exercise of due diligence,' could reasonably have ascertained the fraud. *Wiren v. Paramount Pictures, supra.* How the issue should be decided would depend upon the trial of the issue.

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[2] Section 14, Longshoremen's and Harbor Workers' Compensation Act, 33 USC 901, Extended to District of Columbia, Title 36-501, D.C. Code.

> "If the fraud were found to have been discovered, more than three years before the action was filed, the bar of the statute of limitations would not be avoided by estoppel; the insurance company would no longer have been misled by the fraud, since it had knowledge of it, or could not assert lack of knowledge. Accordingly, the principle stated in *Glus v. Brooklyn Eastern Terminal,* 357 U.S. 231, would not apply."

CONCLUSION

In consideration of the foregoing, appellant respectfully requests this Court to rehear this case or, in the alternative, to rehear this case *en banc*.

Respectfully submitted,

J. E. BINDEMAN

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CERTIFICATE OF GOOD FAITH

We hereby certify that this petition is presented in good faith and not for delay.

J. E. BINDEMAN

LEONARD W. BURKA

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition was delivered, this tenth day of June, 1966 to M. S. Mazzuchi, Esq., Attorney for Appellee, Investment Building, Washington, D. C., 20005.

Leonard W. Burka